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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

RAY MARSHALL, individually and
on behalf of all others similarly
situated,

Plaintiff,

v.

VERDE ENERGY USA, INC.,

Defendant.

Civil Action No. 2:18-cv-01344-JMV-
JBC

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff, Ray Marshall ("Plaintiff" or "Mr. Marshall") respectfully submits this Notice of Supplemental Authority to bring the Court's attention to a recent opinion issued in a nearly identical action against Verde Energy USA, Inc. ("Verde"), *Mercado v. Verde Energy USA, Inc.*, United States District Court, Northern District of Illinois, Case No. 1:18-cv-02068. On February 28, 2019,

Judge Gottschall, faced with a nearly identical set of facts as this case, denied Verde's motion to dismiss plaintiff's breach of contract and unjust enrichment counts. *See* Exhibit 1 ("*Mercado* Order").

This Notice of Supplemental Authority does not advance new arguments that were absent from either Plaintiff's complaint (ECF 1, "Compl.") or his response in opposition to Verde's motion to dismiss (ECF 29, "Resp."). *See Beazer East, Inc. v. Mead Corp.*, 525 F.3d 255 (3d Cir. 2008) (citing Fed. R.App. P. 28(j)); *Atkins v. Capri Training Ctr., Inc.*, No. 2:13-CV-06820 SDW, 2014 WL 4930906, at *10 (D.N.J. Oct. 1, 2014). Similar legal claims are asserted in *Mercado* and the case before the Court, and there are no material differences between the cases' facts that are legally significant.

In *Mercado*, Verde's Terms and Conditions of Service state the variable rate "may change monthly with market conditions." *Mercado* Order at 3. Similarly, in this case, Verde's Terms of Service state that its variable rate "may fluctuate monthly with market conditions." Compl. ¶ 30; Resp. at 12. Judge Gottschall held:

"The court has no idea what Verde, the drafter of the Terms and Conditions of Service, meant by 'market conditions'. Nevertheless, Verde's promise is clear. It is that the variable rate would change based on market conditions. If there is a breach, the breach must be of this promise."

Mercado Order at 3-4. While Judge Gottschall did not know what Verde meant by "market conditions", she explained that "it presumably meant something and

finding out what that was is one of the purposes for which discovery in this case can be utilized.” *Id.* at 4. As such, Judge Gottschall denied Verde’s motion to dismiss the breach of contract claim and also denied its motion to dismiss plaintiff’s alternatively pled unjust enrichment count. *Id.* at 5, 8-9.

Here, Plaintiff Marshall, like Ms. Mercado, alleged that Verde’s rates do not fluctuate with “market conditions.” Resp. at 13, 25 n.8. In light of Judge Gottschall’s Opinion, that is enough for Plaintiff to “adequately allege[] a contractual promise and a breach.”¹ *Mercado* Order at 5. Like *Mercado*, this case should proceed to discovery.

Dated: March 1, 2019

Respectfully Submitted,

/s/ Jason T. Brown

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¹ Here, Mr. Marshall alleges even more than Mercado because Verde also promised him that it “look[s] forward to saving you money on your monthly electric bill in the months to come.” Compl. ¶ 27; Resp. at 12. Mr. Marshall did not save money with Verde, and as such, Verde breached this additional promise.

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Jersey by using the CM/ECF system, which sent notification of such filing to all CM/ECF participants.

s/ Jason T. Brown
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